

On May 31, 2007, claimant was waiting in line with his co-workers to clock out for the day. Anthony Porter was also in line two people ahead of claimant. Mr. Porter was joking with a co-worker in the line in front of him. Claimant reached forward and nudged, pushed or shoved Mr. Porter and jokingly told him; "Don't take this." Mr. Porter then clocked out and started to leave. Claimant moved forward in the line and was getting ready to clock out when he was struck in the nose by Mr. Porter. Mr. Porter was faking a punch not intending to hit claimant but he accidentally connected with him.

Claimant did not think Mr. Porter intended to hit him and Mr. Porter repeatedly apologized after the incident. There was no animosity between the two and after claimant's bloody nose was cleaned they left in the same car. By all accounts the incident was the result of Mr. Porter joking around and faking a punch that accidentally struck claimant.

Respondent argues claimant had shoved or pushed Mr. Porter while they were standing in line waiting to clock out for the day and was engaged in horseplay. Conversely, claimant argues that simply nudging Mr. Porter did not amount to horseplay and he was an innocent victim of Mr. Porter's horseplay.

It has long been the law in Kansas that participants in horseplay, who suffered injuries as a result, were precluded from collecting workers compensation benefits.¹ But the sportive act or horseplay by definition is an act the employee was voluntarily participating in and unrelated to the work he was employed to perform.² But if it is shown that horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable.³

The Kansas Supreme Court, in the recent case of *Coleman*⁴, addressed the issue of horseplay in the workplace. In *Coleman*, the court considered whether a non-participant in horseplay should be compensated for her injuries. In reversing a longstanding rule in Kansas, the *Coleman* court, citing 2 Larson's Workers' Compensation Law, § 23.02, 23-2 (1999), determined that a non-participating victim of horseplay may recover compensation.

At the conclusion of the preliminary hearing, the ALJ stated:

¹ *Neal v. Boeing Airplane Co.*, 161 Kan. 322, 167 P.2d 643 (1946).

² *Id.*, Syl. 4.

³ See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919).

⁴ *Coleman v. Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

I have read the exhibits and I have read the depositions. Reading the testimony of Mr. McCorkle, the depositions and the exhibits in the light most favorable to the respondent, it requires a stretch of the imagination to characterize what Mr. McCorkle did as being horseplay, and I cannot find that what he did was horseplay. Furthermore, even if it was horseplay, there was a clear break in time between what he did with Mr. Porter and the subsequent events. By the time Mr. McCorkle got struck, any previous horseplay that had existed had clearly ceased by then and was only re-instigated by Mr. Powers --or Porter, and at that time Mr. McCorkle could be characterized only as an innocent victim. The Court does find that the claimant's accident arose out of and in the course of employment and that Dr. Barlow will be authorized to treat the claimant.⁵

This Board Member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated January 7, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2008.

DAVID A. SHUFELT
BOARD MEMBER

c: Richard H. Seaton, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

⁵ P.H. Trans. at 22-23.

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2006 Supp. 44-555c(k).